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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 388

JEANNE KING,

Petitioner,

versus

VICO INSURANCE COMPANY OF ST. LOUIS,

Respondent.

Brief in Opposition to Petitioner's Application for Writ of Certiorari.

BRIEF SUBMITTED ON BEHALF OF RESPONDENT-APPELLEE.

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BRIEF SUBMITTED ON BEHALF OF RESPONDENT.

OPINION BELOW.

The opinion of the Louisiana Court of Appeals for the Fourth Circuit is reported in the Transcript of Record and at 182 So. 2d 135 (La. App. 1966), and in the Appendix hereto.

QUESTIONS PRESENTED.

1. Whether the record indicates that the Louisiana Court of Appeals for the Fourth Circuit reviewed conclusions of fact or conclusions of law.

2. Whether the Seventh Amendment to the United States Constitution is obligatory on the states of the Union by operation of the Fourteenth Amendment.

STATUTES INVOLVED.

Amendment VII to the United States Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules at common law.

LSA-Const. Art. 7, §10(6):

In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts.

LSA-Const. Art. 7, §27:

All cases on appeal to the Courts of Appeal shall be tried on the original record, pleadings, and evidence.

The rules of practice regulating appeals to and proceedings in the Supreme Court shall apply to appeals and proceedings in the Courts of Appeal, so far as they may be applicable, until otherwise provided.

STATEMENT OF THE CASE.

Petitioner, Jeanne King, has sued for injuries which she received while a passenger in an automobile owned and operated by Linda Ray. The automobile is insured by the defendant, Vico Insurance Company of St. Louis.

The accident from which this action arises occurred on April 6, 1964 in the following manner: Miss Linda Ray had stopped her automobile behind another vehicle at an intersection. When the way became clear, Miss Ray started her vehicle and, almost immediately after her car had resumed motion, a dog darted out into the street. Seeing the dog in her path, Miss Ray applied her brakes without warning, and petitioner went forward, striking her head against the windshield. In the trial court, the jury, found in favor of petitioner, Miss King. On appeal, however, the Louisiana Court of Appeal, Fourth Circuit, reversed the lower court. Judge Janvier found no negligence on the part of defendant's insured and deemed her action to be reasonable in view of the sudden emergency with which she was confronted.

Petitioner contends that the Louisiana Court of Appeals has reviewed facts found by the jury below and has acted in contradiction to those facts. Petitioner asserts that the appeal court's action is in violation of the Seventh and Fourteenth Amendments to the Constitution of the United States.

Petitioner filed an appeal to the Louisiana Supreme Court, but that court did not see fit to grant a writ of certiorari. Petitioner now appeals to the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT.

1. The Louisiana Court of Appeal did not review facts in the instant case. In consideration of the same facts found at the trial, the appellate court arrived at a different conclusion of law.

2. Even if the Court of Appeal had reviewed facts, petitioner still does not have a valid claim. The Seventh Amendment has never been ruled applicable to the states. The Seventh Amendment applies only to the Federal Government. It is clear that the states exercise control of their respective judicial systems and may direct the nature of their proceedings. The Louisiana Constitution allows review of law and fact by the Louisiana Courts of Appeal, and this law controls the instant situation.

ARGUMENT.

May it please the Court:

POINT I.

The record does not support petitioner's contention that a review of facts found by a jury has occurred in this case.

Petitioner contends that Judge Janvier, Louisiana Court of Appeal, Fourth Circuit, acted in opposition to the Seventh and Fourteenth Amendments to the United States Constitution by reviewing facts found by the lower court in the above captioned case. Although the law consistently indicates that the States have the proper authority to determine the respective natures of their judicial proceedings, there is also a question if the Louisiana Court of Appeal has actually reviewed fact findings in this case.

The facts of this litigation are relatively simple. The insured, Linda Ray, was driving her insured automobile, and petitioner, King, was a guest passenger in that automobile. The pertinent facts found, in regard to petitioner's resultant injuries, were that the insured stopped her automobile suddenly and without warning and that Miss King was thrown forward against the windshield. Furthermore, the facts indicate that there was a dog which darted out into the street in front of the automobile immediately before Linda Ray made her abrupt stop.

On appraisal of these facts, the jury in the lower court found that Linda Ray's sudden stop constituted negligence. On appeal, however, the Court of Appeal, on the same facts, was of the opinion that Miss Ray's abrupt stop was an act in a sudden emergency and did not constitute negligence.

In consideration of this point, it is clear that the two courts reached different conclusions as to the

law—not as to fact. The jury in the lower court found that the factual circumstances constituted negligence on the part of the insured. The appeal court, *in consideration of the same facts,* found simply that these facts did not present a case of negligence, but rather a case of sudden emergency in which the act of the insured was not negligent.

In essence, the Court of Appeal simply came to a different legal conclusion than the jury did in regard to the facts. There is no dispute that the insured came to a sudden stop; this is a fact. However, whether or not that stop constituted negligence is a question of law incumbent upon the appeal court to decide.

In the opinion below, at 182 So.2d 135, 136, Judge Janvier emphasizes that the *facts* are indisputably clear and that his conclusion of *law* in regard to those facts overrules that of the lower court:

> We repeat that there is nothing whatever which tends to contradict the story of Miss Ray, the driver of the car. The record leaves no doubt at all that she had stopped behind the other vehicle; that she had seen the dog walk out into the street and then go back to the sidewalk, "I think, towards Philip Street."
>
> Accordingly, we feel that in bringing her car to a stop Miss Ray instinctively did exactly what other normal persons in the full possession of their faculties would have done. She brought her

car to a sudden and immediate stop. She had no time to consider whether it was best to strike the dog and run the risk of a more serious accident, or to bring the car to a stop.

So, in conclusion, this application is based upon an erroneous presumption. The Court of Appeal did not review facts in the instant case; it merely came to a contrary legal conclusion regarding those facts. To deprive the state appellate courts of this function would be to deprive them of their very essence, their *raison d'etre*. To give effect to petitioner's demands in this case would be to incalculably cripple the essential function of appellate courts—the duty to review questions of law.

POINT 2.

The Seventh Amendment to the United States Constitution is not obligatory on the states of the Union. Jury trial of a civil suit is not a right contemplated by the "privileges and immunities" clause of the Fourteenth Amendment and, as such, the provisions of the Seventh Amendment do not apply to the states. The state governments, which have the ultimate legislative responsibility in this regard, can determine the form and proceedings of their judiciaries, and in exercise of this function may grant the appellate power to review facts as well as law.

Petitioner's claim is dependent upon his contention that the Seventh Amendment protects rights and

privileges so fundamental to due process of law that it is necessarily operative upon the states through the Fourteenth Amendment. An examination of the law indicates that this position has never been supported by the Supreme Court of the United States. In fact, the directly opposite view has been consistently and repeatedly held to be the law.

The effect of the Federal Bill of Rights upon state law was considered early in the history of the Supreme Court. Chief Justice John Marshall established the position that the first ten amendments to the United States Constitution were limitations on the Federal Government and not on the states. In *Barron v. Baltimore*, 7 Pet. 242; 8 L. Ed. 672 (1833) at p. 675, Marshall held that:

> The amendments contain no expression indicating an intention to apply them to state governments. The court cannot so apply them.

The passage of the Fourteenth Amendment considerably modified Marshall's holding. The effect of the Fourteenth Amendment has been this: when rights secured by the first ten amendments are of such fundamental importance to due process of law, a state may not deprive a person of those rights. *Twining v. New Jersey*, 211 U. S. 78, 96; 29 S. Ct. 14, 18; 53 L. Ed. 97 (1908). At p. 103 of the Lawyer's Edition, Mr. Justice Moody states:

> If the right here asserted is not a Federal right, that is the end of the case. We have no

> authority to go further and determine whether the state court has erred in the interpretation of its own laws.

And further, the Court remarked that:

> The right of trial by jury in civil cases, guaranteed by the Seventh Amendment (Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678) and the right to bear arms, guaranteed by the Second Amendment (Presser v. Illinois, 116 U. S. 252, 29 L. Ed. 615, 6 Sup. Ct. Rep. 580), have been distinctly held not to be privileges and immunities of citizens of the United States, guaranteed by the Fourteenth Amendment against abridgment by the states,....

Thus, the effect of the Fourteenth Amendment is to incorporate some, but not all, of the Federal Bill of Rights. More importantly, the Supreme Court has not held that trial by jury in a civil trial is a fundamental element of due process of law and has not held that the requirement of trial by jury is mandatory upon the states.

The first case to directly consider the applicability of the Seventh Amendment to the states was *Edwards v. Elliott*, 88 U. S. 487; 22 L. Ed. 492; 21 Wall. 532, at 558 (1874), which dismissed the contention with the passing remark "That it does not apply to trials in the State Courts."

Two years later, the Supreme Court squarely decided whether the Fourteenth Amendment made

trial by jury in civil cases obligatory in state courts. In the leading case, *Walker v. Sauvinet*, 92 U. S. 90; 23 L. Ed. 678 (1876), petitioner alleged that a Louisiana Statute giving a judge the duty to direct a verdict when a jury was unable to agree on a decision violated the Seventh and Fourteenth Amendments and was unconstitutional. In holding the statute constitutional, the Court stated:

> "So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the Act of 1871 to the contrary.
>
> "By Article VII of the Amendments it is provided, that 'In suits at common law, ... the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliott, 21 Wall. 557, 22 L. Ed. 492 (Sic). The States, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury is not a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the

> trial is had according to the settled course of judicial proceedings. Murray v. Hobken L. & I. Co. 18 How. 280, 15 L. Ed. 376. . .Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution or any law or treaty of the United States." 92 U. S. 90, at 92-93.

The passage quoted above clearly and unmistakably states the position of the law in the present case. The principles enunciated in this decision have been frequently quoted by the Supreme Court and have been consistently followed and expanded since their inception.

The language of Mr. Justice Holmes is quite explicit on this point. Representing a unanimous Court in *Chicago, Rhode Island & Pacific Ry. Co. v. Cole*, 251 U. S. 54, 56; 40 S. Ct. 68, 69 (1919), Justice Holmes clearly illustrates that the Seventh Amendment has no application to the states:

> There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether, Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678; modify its constitution, Maxwell v. Dow, 176 U.S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597; the requirements of a verdict, Minneapolis & St. Louis R.R. Co. v.

Bombolis, 241 U.S. 211; 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86 Ann. Cas. 1916E, 505; or the procedure before it, Twining v. New Jersey, 211 U.S. 78, 111, 29 Sup. Ct. 14, 53 L. Ed. 97; Frank v. Mangum, 237 U.S. 309, 340, 35 Sup. Ct. 582, 59 L. Ed. 969. As it may confer legislative and judicial powers upon a commission not known to the common law, Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and the controversy with regard to their powers in matters of law more generally as illustrated in Spark v. United States, 156 U.S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, and Georgia v. Brailsford, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed.

Shepard's United States Citations indicates that *Walker v. Sauvinet, supra,* has been cited by the Supreme Court in more than three dozen cases. None of these cases consider this case to be other than the definitive holding on the question of the Seventh Amendment's applicability to the states.

To exemplify this position, the following excerpt from Mr. Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149 (1937), at page 151, illustrates the reliance on *Walker v. Sauvinet*. Concerning the Seventh Amendment, Cardozo states:

> This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678; (numerous citations omitted).

This principle of law has been reiterated in numerous cases before the Supreme Court. The subsequent passages are typical:

Malinski v. N. Y., 324 U.S. 401; 65 S. Ct. 781 at 788 1944):

> ". . . to have jury trials in suits at common law. . . ., a requirement which this court has held over and over again for more than a hundred years does not apply to proceedings in state courts. . ." citing among others *Walker v. Sauvinet.*

Stein v. N. Y., 346 U.S. 156; 73 S. Ct. 1077 at 1090 (1953):

> "The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions between judge and jury as they see fit. Cf. Walker v. Sauvinet, 92 U.S. 90....."

It is relevant to note that the later overruling of *Stein v. N. Y.* did not affect or deal with this part of the opinion.

Hague v. C.I.O., 59 S. Ct. 954 (1939) at 966:

> "The privileges and immunities of citizens of the U.S. . . . are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws . . . . That limitation upon the operation of the privileges and immunities clause has not been relaxed by any later decisions of this Court . . . . Upon that ground appeals to this Court to extend the clause beyond the limitation have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement have uniformly been held not to be protected from State action by the privileges and immunities clause."

The decision in *Walker v. Sauvinet* has been relied upon so frequently that it is now well settled law.

Exemplary of state court application of the rule in *Walker v. Sauvinet* is the Louisiana case. *Whatley v. Love*, 13 So. 2d 719 (La. App. 1943). At page 722 the court states:

> As to the right of trial by jury said to have been conferred by Amendment 7 of the Constitution of the United States, it is sufficient to say

that this amendment has no application to State Courts.

And at page 723, the court continues:

> So completely have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning.

The lower federal courts have held that this issue is so foreclosed as to fail to present a substantial federal question. This is illustrated in *New Jersey Chiropractic Association v. State Board*, 79 F. Supp. 327, at 337 (D.C. N.J. 1948):

> . . . the rule in Palko v. Connecticut, 302 U.S. 319, at p. 324, 58 S. Ct. 149, 151, 82 L. Ed. 288, governs as it is therein stated in the following language:
>
> > 'This court has ruled consistently with those amendments trial by jury may be modified by a state or abolished altogether. Walker v.

> Sauvinet, 92 U.S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176, U.S. 581, 20 S. Ct. 448, 494, 44 L. Ed. 597; New York Central R. Co. v. White, 243 U.S. 188, 208, 37 S. Ct. 247, 61 L. Ed. 667, L.R.A. 1917 D.I. Ann. Cas. 1917 D, 629; Wagner Electric Mfg. Co. v. Lyndon, 262 U.S. 226, 232, 43 S. Ct. 589, 591, 67 L. Ed. 961.' Again the plaintiffs have failed to present a substantial federal question for consideration of the court because prior decisions of the United States Supreme Court have foreclosed this subject.

Also directly on point is *Olesin v. Trust Co. of Chicago*, 245 F. 2d 522, at 524 (C.A. 7th 1957) certiorari denied, 355 U.S. 896, 78 S. Ct. 270:

> It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts. Bute v. People of State of Illinois, 333 U.S. 640, 657 (footnote), 68 S.Ct. 763, 92 L.Ed. 986. Trial by jury in civil actions in state courts may be modified by a state or abolished altogether. Walker v. Sauvinet, 92 U.S. 90, 23 L.Ed. 678; Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 494, 44 L.Ed. 597; New York Central Railroad Company v. White, 243 U.S. 188, 208, 37 S.Ct. 247, 61 L.Ed. 667; Wagner Electric Manufacturing Company v. Lyndon, 262 U.S. 226, 232, 43 S.Ct. 589, 67 L.Ed. 961.

A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214. . . .

Ordinarily we are reluctant to dismiss an appeal upon motion. Usually we take the motion to dismiss with the cause and consider same when the case is submitted on the merits, but in the case at bar, it would be an imposition upon the defendants to inflict the expenses incident to an appeal when it is so clear that nothing that could be presented upon the hearings of the cause could change the obvious fact that this is a case where no federal question is involved, and the Federal Courts should not interfere with the processes and procedures of the State Court.

The appeal is dismissed at plaintiff's costs.

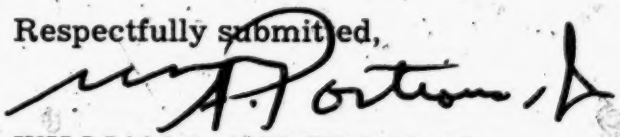
The numerous cases cited herein make it abundantly clear that the Seventh Amendment has no application to the states. The states may institute their judicial proceedings as they see fit. The State of Louisiana, in LSA-Const. Art. 7, §10(6), has empowered its appellate courts to review facts, and, in view of the authorities cited herein, the Louisiana State Constitution controls this instance.

In conclusion, it is respondent's contention that (1) the Louisiana Court of Appeal did not review facts in the instant case, and (2) even if such a situation did present itself, the law upon which petitioner relies does not apply to the states. In view of the unbroken and consistent line of decisions supporting the latter proposition, one may only conclude that the question raised by petitioner is forclosed and the law is settled.

CONCLUSION

For the reasons stated it is respectfully submitted that this Court should deny petitioner's application for a writ of certiorari.

Respectfully submitted,



WILLIAM A. PORTEOUS, JR.

CERTIFICATE.

STATE OF LOUISIANA
PARISH OF ORLEANS:

I, William A. Porteous, Jr., counsel for Respondent and a member of the bar of The United States Supreme Court, hereby affirm under oath that a copy of the foregoing opposition to petition for writs of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid as follows, to-wit:

Honorable Melvin J. Keenan, Clerk,
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New Orleans, Louisiana.

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WILLIAM A PORTEOUS, JR.

Sworn to and subscribed before me this 19th day of September, 1966, at New Orleans, Louisiana.

Notary Public.

JEANNETTE B. WOEST
Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.